



## Yahoo! Inc. v. La Ligue Contre le Racisme et l' Antisemitisme 379 F.3D 1120 (9TH CIR. 2004)

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**379 F.3D 1120 (9TH CIR. 2004)**

I. INTRODUCTION

La Ligue Internationale Contre le Racisme et l'Antisemitisme ("LICRA") and l'Union des Etudiants Juifs de France ("UEJF"), French non-profit organizations dedicated to eliminating anti-Semitism, filed two complaints in a French court alleging Yahoo! Inc. ("Yahoo!"), an Internet service provider ("ISP") based in California, violated French law by carrying Nazi-related discussions and auction items on its American website that is accessible in France.<sup>1</sup> The French Court issued an order giving Yahoo! three months to remove all Nazi-related material stored on its server, remove certain Nazi-related headings from its browser directories, and prohibit access to the Nazi artifacts on its website.<sup>2</sup> A second order affirmed that Yahoo! would be subject to a fine of 100,000 Francs (approximately \$13,300) for every day it did not comply.<sup>3</sup>

Yahoo! subsequently filed a complaint in the U.S. District Court for the Northern District of California (the "District Court") alleging that the orders were not enforceable in the United States and that they violated the First Amendment.<sup>4</sup> The District Court denied LICRA and UEJF's motion to dismiss and granted Yahoo!'s motion for summary judgment, holding that it had specific jurisdiction over both French groups and that enforcement of the orders would violate the First Amendment.<sup>5</sup> The Court of Appeals for the Ninth Circuit reversed, holding that the District Court did not have proper jurisdiction over LICRA and UEJF, and

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1. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 379 F.3d 1120, 1122 (9th Cir. 2004).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1123.

that Yahoo! will have to wait to file its claim until the French groups attempt to enforce the French orders in the United States.<sup>6</sup>

## II. BACKGROUND

Yahoo! is an ISP that offers a variety of services and websites including e-mail accounts, search engines, auction sites, message boards, clubs, dating services, and chat rooms, all accessible from its Uniform Resource Locator (“URL”), <http://www.yahoo.com>.<sup>7</sup> Foreign Yahoo! subsidiaries also operate a number of similar websites in other countries, including [www.yahoo.fr](http://www.yahoo.fr) operated by Yahoo! France.<sup>8</sup> Yahoo! websites ending in the suffix “.com” target users in the United States and are organized and operated under the laws of the United States.<sup>9</sup> Likewise, Yahoo! subsidiary websites containing a prefix or suffix for a specific country, such as “.fr” for France, target the citizens of that country and are organized and operated under the laws of the respective country.<sup>10</sup>

The Yahoo! Internet auction service relevant in this case provides an on-line forum for users across the globe to offer items for sale and bid on items offered by other users.<sup>11</sup> Yahoo! does not participate in the transactions except to record item postings and send notification e-mails to the highest bidders when auctions end.<sup>12</sup> Yahoo! imposes minimal regulation of the transactions, including prohibiting the sale of certain items and prohibiting users from selling items to citizens of jurisdictions where those items are illegal.<sup>13</sup> Users nonetheless have offered Nazi-related

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6. *Id.*

7. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1183-84 (N.D. Cal. 2001).

8. *Id.* at 1183. Some Yahoo! subsidiaries include: [www.yahoo.fr](http://www.yahoo.fr) (Yahoo! France), [uk.yahoo.com](http://uk.yahoo.com) (Yahoo! UK and Ireland), [es.yahoo.com](http://es.yahoo.com) (Yahoo! Spain) and [de.yahoo.com](http://de.yahoo.com) (Yahoo! Germany). *Id.*; see also <http://uk.yahoo.com>, <http://es.yahoo.com>, <http://de.yahoo.com>.

9. *Yahoo!*, 169 F. Supp. 2d at 1183.

10. *Id.*

11. *Id.* at 1184.

12. *Id.*

13. *Id.* The relevant part of the Yahoo! Auctions Guidelines reads:

paraphernalia for sale on the Yahoo! auction sites.<sup>14</sup> In order to comply with French law making the sale of Nazi propaganda illegal, Yahoo! France removed all Nazi material from its website.<sup>15</sup> However, users in France still have access to the American website.<sup>16</sup> LICRA and UEJF discovered they could access the Nazi materials on the American Yahoo! website in April of 2000.<sup>17</sup>

On April 5, 2000, LICRA sent a cease-and-desist letter informing Yahoo! that all Nazi items on its website violated French law and must be removed.<sup>18</sup> On April 10, 2000, LICRA served Yahoo! with process in California via the United States Marshal's Service and filed a civil complaint with the Tribunal de Grande Instance de Paris (the "French Court").<sup>19</sup> Ten days later, UEJF used the United States Marshal's Service to serve Yahoo! with process and filed a second complaint with the French Court.<sup>20</sup>

After determining it had proper jurisdiction over Yahoo! and finding more than one thousand Nazi and Third Reich-related items for sale on its auction site, the French Court ruled that Yahoo! violated Section R645-1 of the French Criminal Code, which prohibits exhibition of Nazi propaganda and artifacts for sale.<sup>21</sup> On May 22, 2000, the French Court issued an order

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You may not offer for sale or sell items to any buyer in a jurisdiction where the item or terms of the sale violate applicable laws or regulations. You also may not offer for auction any item that violates Yahoo!'s policies as described. . . in "Items that are Prohibited on Yahoo!"

Yahoo Auction Guidelines, *available at* <http://auctions.shopping.yahoo.com/html/guidelines.html> (last visited March 15, 2005).

14. *Yahoo!*, 379 F.3d at 1121.

15. *Id.* Section R645-1 of the French Criminal Code bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing such material. *Id.*; *see also* Code Penal Article R645-1, *available at* <http://www.legifrance.gouv.fr> (last visited March 15, 2005).

16. *Yahoo!*, 379 F.3d at 1122.

17. *Id.*

18. *Id.*

19. *See Yahoo!*, 169 F. Supp. 2d at 1184; *Yahoo!*, 379 F.3d at 1122.

20. *Yahoo!*, 379 F.3d at 1122.

21. *Yahoo!*, 169 F. Supp. 2d at 1184. The items for sale on the Yahoo!

requiring Yahoo! to: 1) eliminate all Nazi-related text, messages and material from its server, particularly any Nazi objects, relics, insignia, emblems and flags on its auction site; 2) remove any excerpts from *Mein Kampf* and *Protocole des Sages de Sion*; 3) post a warning on [www.yahoo.fr](http://www.yahoo.fr) that any search through [www.yahoo.com](http://www.yahoo.com) may lead to the acquisition of material prohibited under French law; and 4) remove the heading “negationists” and any equivalent heading under “Holocaust” from the Yahoo! browser directories.<sup>22</sup> Yahoo! objected that compliance with the order would be technologically impossible, but on November 20, 2000, the French Court reaffirmed its decision with a second order, giving Yahoo! three months to comply with the first order.<sup>23</sup> The French Court would fine Yahoo! 100,000 Francs (approximately \$13,300) for every day of non-compliance.<sup>24</sup> Both orders were served on Yahoo! via the United States Marshal’s Service.<sup>25</sup>

Yahoo! did not fully comply with the order, but it did remove *Protocole des Sages de Sion* from its site and it did modify its hate-speech policy.<sup>26</sup> On December 21, 2000, Yahoo! filed a complaint in the Northern District of California seeking a declaration that both judgments were unenforceable in the United States.<sup>27</sup> The District Court denied LICRA and UEJF’s motion to dismiss and granted Yahoo!’s motion for summary judgment,

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auction site included Adolf Hitler’s *Mein Kampf*, *The Protocol of the Elders of Zion* (an infamous anti-Semitic report produced by the Czarist secret police in the early 1900’s), and purported “evidence” that the gas chambers of the Holocaust did not exist. *Id.*

22. *Yahoo!*, 379 F.3d at 1122.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The relevant portion of Yahoo!’s Terms of Service reads: “You agree to not use the Service to: a) upload, post, email, transmit or otherwise make available any Content that is unlawful, harmful, threatening, abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another’s privacy, hateful, or racially, ethnically or otherwise objectionable. . .” Yahoo! Terms of Service, available at <http://docs.yahoo.com/info/terms/> (last visited March 15, 2005).

27. *Yahoo!*, 379 F.3d at 1122.

holding the orders would violate the First Amendment if enforced in the United States.<sup>28</sup> The District Court declared both orders were unenforceable in the United States because, although France has the sovereign right to regulate speech in France, the content and viewpoint-based regulation of the orders, by “chilling protected speech that occurs simultaneously within our borders,” is inconsistent with the First Amendment.<sup>29</sup>

### III. LEGAL ANALYSIS

On appeal to the Ninth Circuit, LICRA and UEJF challenged the District Court’s exercise of personal jurisdiction, the ripeness of the case, and the District Court’s decision to hear the case.<sup>30</sup> The Ninth Circuit concentrated on the District Court’s finding that it had personal jurisdiction over LICRA and UEJF because of certain “minimum contacts” they had with California: 1) sending the cease-and-desist letter to Yahoo!, 2) using the United States Marshal’s Service to serve process on Yahoo!, and 3) requesting the French Court to order Yahoo! to change its server and remove Nazi items from its website in California.<sup>31</sup>

The Ninth Circuit disagreed with the District Court’s finding that LICRA’s and UEJF’s contacts constituted “express aiming” that satisfied “purposeful availment” of the benefits of California.<sup>32</sup> Summarizing precedent on personal jurisdiction, the Ninth Circuit explained that under *International Shoe Co. v. Washington*, if a defendant has certain “minimum contacts” with a forum, he is subject to personal jurisdiction in that forum so long as the suit does not offend “traditional notions of fair play and substantial justice.”<sup>33</sup> This test requires that the defendant either intentionally direct his activities at the forum, or “purposefully avail himself” of

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28. *Id.*

29. *Yahoo!*, 169 F. Supp. 2d at 1192.

30. *Yahoo!*, 379 F.3d at 1123.

31. *Id.* at 1123-24.

32. *Id.* at 1124.

33. *Id.* at 1123, *citing* *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154 (1945).

the privileges of that forum.<sup>34</sup> The Ninth Circuit further explained that the Supreme Court in *Calder v. Jones* found “purposeful availment” when a foreign defendant committed a foreign act with foreseeable consequences in the forum state, because the defendant’s acts were “expressly aimed” at the forum state and thus the defendant “must ‘reasonably anticipate being haled into court there.’”<sup>35</sup> Then the Ninth Circuit explained that in *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.* it narrowed the Supreme Court’s “broad proposition” regarding foreign acts with foreseeable consequences, finding a requirement for “purposeful availment” that the defendant “expressly aim” his conduct at the forum state.<sup>36</sup>

The Ninth Circuit relied on *Bancroft* in finding that LICRA’s and UEJF’s conduct did not constitute “express aiming” because the conduct was not wrongful.<sup>37</sup> In *Bancroft*, the Ninth Circuit concluded that the defendant trademark owner committed “express aiming” when it wrongfully initiated a dispute-resolution process by alerting a regulatory agency and alleging that the plaintiff company was wrongfully using defendant’s trademark as a registered domain name.<sup>38</sup> The defendant argued its action was solely intended to protect its trademark, but the Ninth Circuit accepted the plaintiff’s claim that the defendant was attempting to wrongfully convert the domain name.<sup>39</sup> The Ninth Circuit thus extracted a requirement from *Bancroft* that “express aiming” requires wrongful conduct.<sup>40</sup> Whereas the District Court concluded that LICRA’s and UEJF’s conduct was intended “to compel Yahoo! to censor constitutionally protected content in California,” the Ninth Circuit held that the groups were merely

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34. *Id.* at 1123, citing *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

35. *Id.* at 1124, citing *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984).

36. *Yahoo!*, 379 F.3d at 1124, citing *Bancroft*, 223 F.3d at 1087.

37. *Id.* at 1125.

38. *Id.*, citing *Bancroft*, 223 F.3d at 1085.

39. *Id.*

40. *Id.* at 1125.

“acting to uphold their legitimate rights under French law.”<sup>41</sup> Bringing suit in a foreign court against a party that happens to be from California does not satisfy the “express aiming” requirement for purposeful availment of the benefits of California.<sup>42</sup>

The Ninth Circuit ruled that because LICRA and UEJF vindicated their rights with the French Court, their conduct was not wrongful, and therefore the District Court did not have personal jurisdiction over them.<sup>43</sup> Thus, Yahoo! would have to wait for the groups to enforce the judgment in the United States before it can bring its First Amendment claim, a natural consequence of violating the speech laws of another nation.<sup>44</sup>

The Ninth Circuit ended its discussion by finding no personal jurisdiction; because the District Court did not have jurisdiction over LICRA and UEJF to hear the case, there was no need to review the ripeness of Yahoo!’s claim nor the District Court’s refusal to abstain from granting summary judgment.<sup>45</sup>

#### IV. CONCLUSION

LICRA and UEJF, French non-profit organizations dedicated to eliminating anti-Semitism, brought suit in a French Court alleging Yahoo! Inc., an ISP based in California, violated French law by carrying Nazi-related discussions and auction items on its American website that is accessible in France.<sup>46</sup> The French Court issued two orders giving Yahoo! three months to remove all Nazi-

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41. *Id.* at 1124, 1126.

42. *Yahoo!*, 379 F.3d at 1126.

43. *Id.*

44. *Id.*

45. *Id.* LICRA and UEJF argued that Yahoo!’s claim does not relate to an actual controversy because LICRA and UEJF have not yet initiated the complicated proceedings with the French Court to have the orders actually enforced, nor do they plan on doing so because Yahoo! has taken “substantial steps” toward compliance. *Yahoo!*, 169 F. Supp. 2d at 1188. LICRA and UEJF also argued that the District Court should have abstained from hearing the claim because Yahoo! is committing international forum-shopping in seeking out a more favorable result. *Id.*

46. *Yahoo!*, 379 F.3d at 1121-22.



related material stored on its server, remove certain Nazi-related headings from its browser directories and prohibit access to the Nazi artifacts on its website.<sup>47</sup> Yahoo! sought a declaratory judgment from the U.S. District Court for the Northern District of California that the orders were unenforceable in the United States and violated the First Amendment.<sup>48</sup> The District Court ruled the orders were unenforceable because, although France has the sovereign right to regulate speech in France, the content and viewpoint-based regulation of the orders is inconsistent with the First Amendment by “chilling protected speech that occurs simultaneously within our borders.”<sup>49</sup> The Ninth Circuit reversed, holding that the District Court did not have personal jurisdiction over LICRA and UEJF because the groups did not “expressly aim” their conduct at California sufficient for “purposeful availment,” thus they did not have “minimum contacts” with the forum.<sup>50</sup> Therefore, Yahoo! will have to wait to bring its claim until LICRA and UEJF seek to enforce the French orders in the United States.<sup>51</sup>

*Alison Kelly\**

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47. *Id.*

48. *Id.*

49. *Yahoo!*, 169 F. Supp. 2d at 1192.

50. *Yahoo!*, 379 F.3d at 1126. The Ninth Circuit reversed the district court despite a strong dissent asserting that LICRA and UEJF “expressly aimed” their actions at California intending a specific effect, thus satisfying the “minimum contacts” requirement for personal jurisdiction. *Id.* at 1134-35.

51. *Id.* at 1126.

\* In February of 2005, the Ninth Circuit ordered this case be reheard by the *en banc* panel pursuant to Circuit Rule 35-3. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 399 F.3d 1010 (9th Cir. Feb. 10 2005).